No. 11284

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALBERT DEL GUERCIO, District Director, Immigration and Naturalization Service, United States Department of Justice, District No. 16,

Appellant,

vs.

ESTHER PUPKO,

Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANTS' REPLY BRIEF.

Criminal Conviction.

Counsel for Appellee concludes that the trial judge believed the explanations of Appellee and disbelieved the record evidence of her conviction of having resorted to a room with a person to whom she was not married for the "purpose of having sexual intercourse, and for other immoral purposes" as charged in the criminal complaint. Appellee's counsel states "there was no evidence presented to the court or any proof of any immoral acts actually carried on. The forbidden ordinance made it [an] offense to even go to a room or be in a room, apparently, with a man for the purpose of having sex relations * * *. In this respect, the trial judge by his ultimate decision found in her favor" (App. Br. pp. 9,10). Such conclusion

is not sustained by the transcript of the naturalization proceeding before the District Court. A close reading of the Transcript of Record leads to the opposite view. When Appellee attempted to tell the trial judge about other girls who apparently had been contacted by the Palm Springs officers, the Court commented, "Policemen don't go around framing people" [R. 59]. The Court inquired of the Government Representative, "What were the other immoral purposes? I mean, do you have any record of it?" [R. 45.] The Court elicited from Appellee that two police officers testified as witnesses against Appellee before the City Judge [R. 57]. Finally the Court concluded: "There is no record that she was a professional prostitute or even a loose woman, *other than this one incident* * * *" (italics added) [R. 63]. Prior to making this comment the Court had heard the testimony of Appellee that she had come to California alone [R. 48]; that she had been employed for about six months at the Roseland Dance Hall as a taxi dancer licensed by the City of Los Angeles [R. 43]; that she had worked at various places as a waitress [R. 43] and as a cashier at the Sunset Bowling Alley [R. 49], and that at the time of her appearance before the District Court she was employed as a photographer in a night club on Vine Street, and that her mother had only recently come to Los Angeles [R. 50]. Competent evidence of the conviction and proceedings before the Palm Springs City Judge was before the District Court [R. 9-18, 34-36]. The City Judge and police officers are presumed to have performed their official duties in a regular and lawful manner.[1] It cannot be assumed from the

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[1]*In re Harris Brothers*, 5 F. Supp. 191, 192; *Wall v. Hudspeth*, 108 F. (2d) 865, 867.

mere fact of granting the petition for naturalization that the District Court Judge believed Appellee not guilty as charged and convicted.

Appellee's counsel reasons that the case of *United States v. Clifford,* 89 F. (2d) 184, cited by the government, does not support the conclusion that the judgment of conviction is conclusive as against the unsupported denial of the Appellee (App. Br. p. 5). At page 185 of that case the Court in commenting on the alien's conviction of conspiracy states: "Such a crime involves an unlawful intent which the judgment of conviction established beyond any contradiction sought to be proved by the affidavit." The Second Circuit Court of Appeals denied a petition for rehearing in a writ of habeas corpus proceeding involving an alien under deportation, and in considering the question of whether the immigration authorities or the Court might go behind the record of conviction to determine whether or not the crime involved moral turpitude stated: "The evidence upon which verdict was rendered may not be considered, nor may the guilt of the defendant be contradicted."[2]

False Statements in the Naturalization Proceeding.

With respect to the various statements of Appellee in the naturalization proceeding, concealing her arrest and convictions, counsel would excuse them as "white lies" (App. Br. p. 12). Significantly, the attitude of Congress toward false statements in the naturalization proceeding

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[2]*U. S. v. Corsi* (2d Cir.), 63 F. (2d) 757, 758. See also *U. S. ex rel. Mylius v. Uhl,* 203 Fed. 152, 154, affirmed 210 Fed. 860 (C. C. A. 2, 1913).

is expressed in the following criminal provision which is a part of the Nationality Act of 1940:[3]

> "(a) It is hereby made a felony for any alien or other person, whether an applicant for naturalization or citizenship, or otherwise, and whether an employee of the Government of the United States or not—
>
> "(1) Knowingly to make a false statement under oath, either orally or in writing, in any case, proceeding, or matter relating to, or under, or by virtue of any law of the United States relating to naturalization or citizenship."

There is no conflict in the evidence relating to the falsity of the statements made by Appellee in the naturalization proceeding, both orally and in writing, and that they were made knowingly and intentionally. Appellee testified that she wrote in the answer "no" to question No. 30 appearing on Naturalization and Immigration Service Form N-400, reading: "Have you ever been arrested or charged with violation of any law of the United States or any city ordinance or traffic regulation? If so, give full particulars." Form N-400 is an official form prescribed by law [R. 18b, 37, 38].[4] It is provided by regulation that:[5]

> "Section 370.1. Each prospective petitioner for naturalization shall be required to fill out properly and sign preliminary application Form N-400 and submit

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[3]Sec. 346 (a) (1), Nationality Act of 1940 (8 U. S. C. 746 (a) (1)).

[4]Sec. 327 (a) and (d), Nationality Act of 1940 (8 U. S. C. 327 (a) and (d)), and Title 8, Code of Federal Regulations, Sec. 361.3.

[5]Sec. 370.1 and 8, Title 8, Code of Federal Regulations.

it, * * * to the immigration and naturalization office * * *."

"370.8. Wherever practicable, preliminary examination of applicants for naturalization and their witnesses shall be made in person and under oath. The applicant and each witness shall be interviewed separately and apart from one another. The purpose of such examinations shall be to obtain accurate and material information bearing upon the applicant's admissibility to citizenship * * *. *If the applicant has been arrested or charged with the violation of any law or ordinance, the facts shall be ascertained, including information as to whether conviction resulted and the nature and extent of any sentence which may have been imposed.* * * *" (Italics ours.)

Appellee testified before the District Court that she had been examined separate from her witnesses at a preliminary examination by Examiner Davis [R. 39, 40], and that on the same date she appeared before designated Examiner Miss Parker [R. 40, 41, 60-62]. The Appellee swore before Miss Parker on that occasion that her statements before preliminary Examiner Davis were true. Appellee further swore to tell the truth when testifying before Miss Parker. Appellee couldn't remember whether Miss Parker had asked her the specific question as to whether or not she had been arrested, but did testify: "I do remember her asking me if I answered the questions honestly, and I swore to it, and that one question I had not answered correctly" [R. 42]. Miss Parker testified [R. 60, 61] that she swore the Appellee to tell the truth, and that she asked the Appellee if she had been arrested and that Appellee answered "No."

The appearance before the designated examiner is provided for by law and regulation.[6] The regulation authorizes in part:

> "Sec. 373.1 (a). Preliminary hearings shall be conducted in person by the designated examiner . . . and the petitioner and his witnesses shall be present. The petitioner and witnesses shall first be duly sworn. The designated examiner shall have before him at the preliminary hearing the record of the preliminary examination in each case. He shall not, however, be limited to the information contained in such record, but may use any material evidence or data received from any other source; and he may present and examine other witnesses than those produced by the petitioner."

The argument is untenable that such statements can be overlooked as "white lies" in the face of the naturalization regulations specifically requiring disclosure of any arrests or convictions and the expressed attitude of Congress in the same Nationality Act, making an intentional failure to disclose such matters a crime. Appellee has not met the burden demanded by law as a condition precedent to the granting of citizenship, for "an alien who seeks political rights as a member of this nation can rightfully obtain them only upon terms and conditions specified by Congress."[7] False statements before the naturalization ex-

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[6]Sec. 333 (a), Nationality Act of 1940 (8 U. S. C. 733), and regulations thereunder set forth in Sec. 373.1 (a), Title 8, Code of Federal Regulations.

[7]*U. S. v. Ginsberg,* 37 S. Ct. 422, 425, 243 U. S. 472, 474, 61 L. Ed. 853. See also *U. S. v. Mazzoni,* 43 F. Supp. 56 and *U. S. v. Zgrebec,* 38 F. Supp. 127.

aminers is properly a grounds for the denial of naturalization.[8]

The basis for determining the required moral standard under the naturalization laws is measured by the moral standard of the average citizen in the community and not by any particular group of individuals in a community[9] as implied in the statement of counsel for Appellee reading:

> "No doubt the Judge might have well reflected that biblical statement 'He who is without sin among you, let him cast the first stone,' and he might well have inquired whether there was any such among the immigration officers who were pressing the proceeding." (App. Br. p. 11.)

The personal reference in this respect to the immigration officers has no proper place in an appellate brief.[10]

Respectfully submitted,

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[8]*Pet. of Ledo,* 67 F. Supp. 917, decided Sept. 12, 1946. See also *U. S. v. Saracino,* 43 F. (2d) 76.

[9]*Application of Polidka,* 30 F. Supp. 67.

[10]*Anderson v. Federal Cartridge Corp.,* 156 F. (2d) 681, 686.